86

(4)

No. 07-690

FILED
FEB 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DUCHESNE CITY, ET AL.,
Petitioners,

v.

SUMMUM, A CORPORATE SOLE AND CHURCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIAN M. BARNARD
UTAH CIVIL RIGHTS & LIBERTIES FOUNDATION, INC.
214 East 500 South St.
Salt Lake City, Utah
84111-3204

MARTIN S. LEDERMAN
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001

WALTER DELLINGER
PAMELA HARRIS
(*Counsel of Record*)
SHANNON PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

QUESTION PRESENTED

Petitioner Duchesne City owns and operates a city park that contains a monument, donated by a local family, with an engraved depiction of the Ten Commandments. In an effort to disassociate itself from that expression, the City twice attempted to transfer the small plot of park land on which the monument stands to private parties. Respondent Summum asked the City for permission to display its own monument in the park or to be transferred a similar plot of park land on which to display its monument. The City denied that request.

The United States Court of Appeals for the Tenth Circuit held that the City's first attempted land transfer was invalid under state law, and that the city violated Summum's rights under the Free Speech Clause of the First Amendment by denying it equal access to a traditional public forum absent a compelling reason. The court remanded the case for additional proceedings with respect to the effect and the state-law validity of the City's second attempted transfer. The question presented is:

Whether the Tenth Circuit erred in holding that the City's attempted land transfer was invalid under state law, so that the Ten Commandments monument remained a part of a traditional public forum, within which the City could not deny equal access to other speakers.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 2
A. Factual Background 2
B. Proceedings Below 3
REASONS FOR DENYING THE WRIT 10
CONCLUSION 14

TABLE OF AUTHORITIES

Page

Freedom from Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000).....5

Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007).....1, 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners present this case to the Court in tandem with another certiorari petition, *Pleasant Grove v. Summum*, No. 07-665. As we have explained in our Brief in Opposition in *Pleasant Grove*, review is unwarranted in that case. The instant case presents an even less appropriate vehicle for review of the issues petitioners would have the Court consider.

In this case, petitioners never – at *any* stage of the litigation below – raised the question at the heart of their petition for certiorari, namely, whether the depiction of the Ten Commandments on the park monument constitutes government, rather than private, speech for First Amendment purposes. To be sure, that issue was not fully briefed in the *Pleasant Grove* litigation, either. *See* Pleasant Grove Brief in Opposition ("BIO") at 2, 7-8, 16-17. But here, petitioners never once even alluded to the issue – not before the district court, not before the court of appeals panel, and not before the full Tenth Circuit on petition for rehearing *en banc*.

Instead, petitioners chose a diametrically opposed litigation strategy: They argued that by attempting to sell the land on which the Ten Commandments monument stood, the City had, in the words of the district court below, "rid itself of any association with the sponsorship of that particular expression." Pet. App. 9b. As a result, the issue actually at the heart of this case is the validity under state law of the City's two purported land transfers, not the governmental or private status of the speech in question. And having argued strenuously below

that "the City has nothing to do with the property or anything expressed on the property by its private owners," *id.* 11b, petitioners are poorly positioned to claim now, for the first time, that the speech in question is properly viewed as "government speech" for Free Speech Clause purposes.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Duchesne City ("the City") is a municipality in Duchesne County, Utah, that is home to Roy Park. Pet. 4. That city park contains a "Fraternal Order of Eagles-style" Ten Commandments monument donated by the Cole family in 1979. *Id.* The City has never taken any steps to adopt the message on the Ten Commandments monument as its own. Instead, after the monument had been displayed in Roy Park for nearly 25 years, the City attempted to "disassociate itself from . . . [that] display of private expression" by giving away the land on which it stood. Pet. App. 9b; *see also id.* 2a, Pet. 5. In August 2003, the mayor executed a quitclaim deed transferring the 10' x 11' plot of land in Roy Park that housed the monument to the Duchesne Lions Club, of which the mayor was also president. Pet. App. 2a; Pet. 5. The contract for the transfer cited the Lion's past "work in cleaning and beautifying the city as consideration for the transfer." Pet. App. 2a.

Summum is a corporate sole and church founded in 1975 and headquartered in Salt Lake City, Utah. In September 2003, Summum sent a letter to the City asking either for permission to erect a monument depicting the Seven Aphorisms of Summum in

Roy Park, or to be given a small plot of land in the park to display its monument. Pet. App. 2a; Pet. 5. In its request, Summum specifically asked for the same access to city property as the Lions Club received. *Id.* In a responsive letter, the City stated that it would grant Summum a plot of land in Roy Park "if the organization contributed the same amount of service to the City as the Lions Club had contributed." Pet. App. 2a. Summum treated this letter as a denial of its request. *Id.* 3a.

On June 16, 2004, after Summum filed suit and the parties filed cross-motions for summary judgment, the mayor, as president of the Lions Club, transferred the park land back to the City, again by executing a quitclaim deed. *Id.* 20a; Pet. 6. "[I]n another effort to distance itself from the monument," Pet. App. 10b, the City then authorized the mayor to sell the Ten Commandments plot of land to the Cole daughters, whose family had originally donated the monument, for $250 "and other considerations." *Id.* 20a.[1] Following the sale, the City erected a four-foot tall white picket fence around the property, as well as a sign that declares that the City does not own the property. *Id.* 3a.

B. Proceedings Below

1. On November 26, 2003, Summum filed suit against the City and various current and former City

---

[1] The city council conceded that it authorized the sale to the Cole daughters for purposes of this litigation, as it declared "the sale of said portion of Roy Park will further the important public interests of terminating potentially costly litigation and avoiding future litigation by permanently closing Roy Park as a forum for such private displays." Pet. App. 11.

officials in the U.S. District Court for the District of Utah under 42 U.S.C. § 1983 and the Utah Constitution. The complaint asserted violations of Summum's rights under the Free Speech Clause of the First Amendment to the United States Constitution, and the Free Speech and Establishment Clauses of the Utah Constitution. *See* Compl. 11-13. Summum sought declaratory and injunctive relief, as well as damages. *Id.*

The parties filed cross-motions for summary judgment. Summum argued that even if the land transfers were valid, its Free Speech rights were violated because the City denied Summum the same access to a traditional public forum that it had afforded other private parties. *See* Pl.'s Mem. re: Mot. for Summ. J. 3; Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. 13-15. The City maintained that before it effected its land transfers, the park was a nonpublic forum for permanent monuments, in which its rejection of Summum's request on the basis of the speaker's identity was permissible. Once it transferred the land on which the Ten Commandments monument stood, the City argued, it was no longer associated with the monument, and the nature of the forum "*changed the forum of Roy Park*, from a nonpublic forum of permanent private monuments to a nonpublic forum of no permanent private monuments." *See* Defs.' Mem. of Law in Supp. of Defs.' Mot. for Summ. J. 16; *id.* at 6-7. The City did not even suggest that during any time period – pre- or post-sale – the Ten Commandments display on the monument might constitute government speech.

Rather than applying Free Speech Clause forum analysis to the case before it, the district court relied

primarily on *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), an Establishment Clause case alleging governmental endorsement of a religious display. Pet. App. 11b, 11a-12a. The district court concluded that the City's second land sale, to the Cole daughters, had effectively disassociated the City from the speech conveyed by the monument. *Id.* at 13b ("nothing on the property is in any way endorsed by or associated with Duchesne City," and nobody "could believe the city is presently sponsoring whatever expression is reflected on the plot owned by the Cole daughters"); *see also id.* at 14b.

In a subsequent order, however, the district court held that prior to the sale to the Cole daughters – and even after the transfer to the Lions Club – the City had not sufficiently distanced itself from the private speech contained on the Ten Commandments monument. Pet. 9; Pet. App. 4a. Based on this holding, the court found that the City had violated Summum's free speech rights during this period of time, but deemed the violation "technical" and awarded Summum $20 in nominal damages. *Id.*

2. Summum appealed the district court's determination concerning the second transfer to the Cole daughters. Summum argued that the City's display of the Ten Commandments monument created a traditional public forum in which it was entitled to equal access, and that the City's sale of the property was both invalid under state law and insufficient to close the forum. *See* Br. of Appellant 17-19.

The City cross-appealed the district court's finding that it violated Summum's Free Speech rights

subsequent to the transfer to the Lions Club. The City continued to argue that prior to its land sales, it had been operating only a nonpublic forum for the display of private monuments, in which it could impose reasonable, viewpoint-neutral restrictions. *See* Appellees' Answering Br. & Cross-Appellants' Opening Br. 22-23. *See, e.g.*, *id.* at 29 ("Roy Park was a nonpublic forum for purposes of erecting permanent private displays."); *id.* at 32 (defending the denial of Summum's request as a legitimate "distinction based on a speaker's identity"). After the sales, the City contended, it had effectively closed its forum to the display of all private monuments. Again, the City failed to argue that at any point in time the Ten Commandments monument represented government, rather than private, speech.[2]

In the decision of the court of appeals below, Chief Judge Tacha began by noting that Roy Park is a traditional public forum, so that the City's restrictions on speech in the park ("e.g., excluding Summum's Seven Aphorisms while allowing the Ten Commandments") are subject to strict scrutiny, and must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that interest." Pet. App. 8a (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)). Importantly, the City conceded that "it excluded Summum's speech based upon its subject

---

[2] The City also filed a cross-appeal concerning the district court's refusal to grant summary judgment as to Summum's request for declaratory relief and nominal damages, as well as the court's denial of the City's motion for summary judgment for lack of standing. Both parties also appealed the attorneys' fee award.

matter and the speaker's identity," but did not assert a "compelling interest" for such discrimination and thus could not satisfy strict scrutiny. *Id.* 17a. Accordingly, if the plot of land containing the Ten Commandments monument remained part of the traditional public forum, the City could not justify excluding the proposed Summum monument under the applicable First Amendment standard. *Id.* 7a.

Thus, the "difficult question" in this case, the court stated, is "whether the small plot of land with the Ten Commandments monument remains part of a public forum (i.e., the city park) despite the City's efforts to sell it to a private party." *Id.* 9a. The Tenth Circuit concluded that the district court had erred in two respects in answering this critical question. First, it had failed to engage in the relevant forum analysis under the Free Speech Clause, relying instead on an Establishment Clause case to conclude that the City had adequately removed the Ten Commandments monument from its public forum and thus closed that forum to the display of private monuments. *Id.* 11a. Establishment Clause analysis is inapposite, the court of appeals explained, because "a determination of whether the government is endorsing religion is not the same as a determination of whether speech is occurring in a public forum." *Id.* 11a-12a.

The district court also erred, the Tenth Circuit held, in failing to address the threshold state-law question of "whether the property at issue is in fact privately owned," instead simply "assum[ing] that both sales were valid." *Id.* at 12a-13a. Under Utah law, a sale of public property must: 1) be conducted in good faith; and 2) be accompanied by adequate

consideration, defined as a "present benefit that reflects the fair market value" of the property. *Id.* 14a. Moreover, certain public property, including park property, may not be sold where it will continue to be used for the same purpose, and there must be documentation of the fairness of the transfer. *Id.* 15a.

Judged against these criteria, the Tenth Circuit found that the City's purported sale of the land to the Lions Club was "clearly invalid" because there was no documentation of the fairness of the transfer – i.e., there was no showing of adequate present consideration reflecting fair market value. *Id.* 15a-16a. Moreover, the mayor who executed the transfer was also the president of the local chapter of the Lions Club, raising "considerable doubt" that the transfer was made in good faith. *Id.* 16a. Thus, the sale was invalid under state law, and the land remained part of a traditional public forum at the time of Summum's request. As noted above, the City had not attempted to justify its concededly subject-matter and speaker-based exclusion of the proposed Summum monument under the strict scrutiny standard applicable in such fora.[3] Accordingly, the court concluded

---

[3] Instead, the City asserted simply that "no constitutional right exists to erect a permanent structure on public property." Pet. App. 17a-18a. In response, the Tenth Circuit declined to "address that proposition in its most general application," because "in any event it does not apply when the government allows some groups to erect permanent displays, but denies other groups the same privilege." *Id.* 18a.

Indeed, the court "doubt[ed] the sincerity of the City's stated reason (and therefore its motive) in excluding Summum's speech" – i.e., Summum's alleged lack of community service – and noted that this reason, even if genuine, in the absence of

that "Summum's free speech rights were violated prior to the property's transfer to the Cole daughters." *Id.* 19a.

With respect to the subsequent sale of the park land to the Cole daughters, the Tenth Circuit held that the record was "insufficiently developed to determine whether the sale . . . is valid," *id.* 14a, and questioned whether it could survive scrutiny under state law, *id.* 20a. Because a "genuine issue of material fact exists concerning the validity of the City's transfer," the court reversed and instructed the district court to "first decide whether the sale meets the requirements of state law." *Id.* 21a. If the sale is valid, the court may then "decide the constitutional issue of the property's forum status." *Id.*

3. The City sought rehearing en banc, arguing that the panel erred in determining precisely what kind of speech forum was involved in the case, and that Roy Park was not a "traditional public forum for the display of permanent, private monuments." Defs.' Pet. for Reh'g En Banc 3. The City did not argue or even suggest in its rehearing petition that the Ten Commandments monument reflected government speech.

After consolidating the rehearing petition with the separate rehearing petition pending in *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), the Tenth Circuit denied rehearing with three judges dissenting and Judge Tacha issuing a separate opinion responding to the dissents. *See* Pet. App. 1h. Those opinions, which focus primarily on

---

"specific guidelines" would "confer[] too much discretion on city officials to exclude speech from a public forum." *Id.*

the government speech issue raised for the first time by petitioners in *Pleasant Grove* in their petition for rehearing en banc, are described in detail in our Brief in Opposition in that case. *See* BIO at 10-12.

REASONS FOR DENYING THE WRIT

1. Petitioners in this case, like petitioners in *Pleasant Grove*, seek this Court's review of a rule the Tenth Circuit has never actually announced or applied. According to petitioners, though this case does not implicate the issue directly, it was "litigated in the shadows" of prior Tenth Circuit precedent holding that "whenever a government accepts, erects, and displays a monument donated by a private entity, the government creates a speech forum for permanent monuments proffered by other private entities." Pet. 1. Petitioners are correct that such a rule would be "extraordinary." *Id.* But they are incorrect in asserting that the Tenth Circuit has ever adopted that blanket rule.

Instead, as explained in the *Pleasant Grove* Brief in Opposition, the Tenth Circuit has held only that once a governmental entity opens a traditional public forum to some form of private speech – here, the display of privately-donated monuments – it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest. BIO at 13-14, 19. And on the question of whether it is the government or a private party who is speaking when a privately-donated monument is involved, the Tenth Circuit has not, contrary to petitioners' suggestions, Pet. i, 6, held that a privately-donated monument displayed on government property necessarily constitutes "private

speech" for Free Speech Clause purposes. Rather, the Tenth Circuit – like other federal circuits – applies a context-specific, multi-factored test to determine the identity of the speaker in such cases. *See* BIO at 2-4, 23-24. And Circuit precedent makes clear that a privately-donated monument or display may in fact constitute "government speech" when the government acts in a way that effectively adopts that expression on the monument as its own. *Id.* at 2-4, 14-17. The decisions petitioners complain of – here and in *Pleasant Grove* – are no more than fact-specific applications of this narrow and context-sensitive rule. They do not implicate, and would not give this Court the opportunity to address, any broader issues concerning the line between private and government speech under the Free Speech Clause.

2. The purported conflicts of authority petitioners cite here to justify review are identical to those asserted in the *Pleasant Grove* petition, and they are illusory for the reasons explained in our Brief in Opposition in that case. *See* BIO, Part III. Neither the decision below nor any other Tenth Circuit precedent has concluded that all privately-donated monuments are *ipso facto* private speech, or that there is an unfettered constitutional right of private speakers to erect permanent private monuments on public property. *See id.* at 23. Likewise, no other circuit has endorsed the rule advanced by petitioners that *any* monument owned by the government and displayed on government land must necessarily constitute government speech. *See id.* at 23-28. Nor, finally, has any other court of appeals taken issue with the Tenth Circuit's unexceptional holding that the gov-

ernment may not discriminate among speakers in allowing access to a traditional public forum in the absence of a sufficiently compelling interest under the strict-scrutiny standard. *Id.* at 29-30.

3. There are additional reasons why this case would be a particularly poor vehicle for review of the questions petitioners have presented. The City here never, at *any* point in the litigation below, raised or even hinted at the issue at the heart of its certiorari petition, namely, whether the speech on the Ten Commandments monument should properly be viewed as government speech under the Free Speech Clause. Instead, as the Tenth Circuit opinion made clear, the critical issue below was the validity of the City's attempted land transfers under state law – an issue obviously not appropriate for this Court's review.

Indeed, the City actually conceded in the context of this litigation that Roy Park was a nonpublic forum for the display of private speech on permanent structures. *See supra*, at 4, 6. In its view, the transfer of the plot containing the Ten Commandments monument removed the monument from that forum and thus effectively closed the forum as to permanent structures. *Id.* But the City has never disputed that prior to the transfer the park was a forum open to *private* and permanent speech displays[4] – and, conversely, never suggested that the Ten Commandments monument in question constituted anything other than private speech.

---

[4] Indeed, in offering Summum a plot of land for its monument if it performed some undefined amount of community service, the City confirmed that a forum for private speech remained open even *after* the transfer. *See supra*, at 3.

With respect to the land transfers themselves, the City's strategy in the courts below was wholly inimical to its current position. The very point of transferring the land on which the Ten Commandments monument stands was to *disassociate* the government from that speech, Pet. App. 9b – to make clear, as the District Court explained, that the City is *not* "sponsoring whatever expression is reflected on the plot owned by the Cole daughters." *Id.* 13b. That transfer, in other words, established that the monument was a *private* monument on *private* land. Having prevailed on that argument in the District Court, convincing that court that it had "effectively communicated to the public that it is not sponsoring the [monument] speech," *id.* 14b, the City cannot now decide for the first time that it would be better served by embracing the Ten Commandments monument as its own "government" speech.

4. Perhaps in acknowledgment that this case presents special problems as a vehicle for review, petitioners suggest that the Court might grant the petition in *Pleasant Grove* and hold the present petition pending resolution of that case. As we have explained, review in *Pleasant Grove* is both premature in light of the procedural posture of that case, and unnecessary due to the narrow, fact-based nature of the decision and the lack of any circuit conflict. *See generally* BIO, Parts I-IV. But even if review in that case were somehow warranted, there still would be no reason to hold this petition. Petitioners in this case never raised below the issue presented by their petition, and litigated their case in a manner wholly inconsistent with their eleventh-hour claim that the Ten Commandments monument should be viewed as

government speech. The petition should be denied outright.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BRIAN M. BARNARD
UTAH CIVIL RIGHTS & LIBERTIES FOUNDATION, INC.
214 East 500 South St.
Salt Lake City, Utah
84111-3204

WALTER DELLINGER
PAMELA HARRIS
(*Counsel of Record*)
SHANNON PAZUR
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

MARTIN S. LEDERMAN
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Counsel for Respondent

February 25, 2008